MICHIGAN JUDGES ASSOCIATION

FOUNDED 1927

April 29, 2004

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Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2003-04
Proposed Amendments to Rules of Criminal Procedure

Dear Mr. Davis:

At the April meeting of the Michigan Judges Association, the Rules Committee and the Executive Board considered the proposed amendments contained in ADM 2003-04. MJA supports the proposed amendments, except as noted herein and with some commentary on the support.

MCR 6.005(F) Multiple representation. A proposal to eliminate joint representation by the same lawyer or lawyers associated in the practice of law is not supported by MJA. The vote at the Executive Board was 11votes against this proposal and 9 votes in favor of it. The judges voting against the proposal were concerned with the right of a criminal defendant to choose his or her lawyer and having the right completely abrogated by court rule. Everyone recognizes the difficulty created by joint representation and the potential for conflict situations. However the Sixth Amendment right to counsel of a defendant's choice, although not an absolute right, would be abrogated by this rule.

MCR 6.106(D)(2)(o) In the second sentence, after the comma, MJA recommends words: "order under this paragraph" be deleted and that these words be replaced with: "most restrictive provision of each order". The second sentence, with our proposed amendment would read:

> "If an order under this paragraph limiting or prohibiting contact with any other person is in conflict with another court order, the most restrictive provision of each order shall take precedence over the other court order until the conflict is resolved."

We suggest this change to address conflicts that may arise between personal protection orders, mutually entered restraining orders, and bail decisions in criminal cases. The proposed change would ensure that all provisions protecting a party contained in every order could be enforced.

MCR 6.110(B) The potential conflict between MCR 6.110(B) and MCL 766.7 can be resolved. MJA suggests that adding the words "after consent" to the court rule before the words for good cause shown would eliminate the conflict. This sentence of the proposed rule would then read:

> "If the parties consent, for good cause shown, the Court may adjourn the preliminary examination for a reasonable time."

MJA supports the remaining changes in MCR 6.110(B).

MCR 6.302(B)(5) MJA proposes removing the word "necessarily" from the proposed amendment. The defendant would be told unequivocally that the defendant will not have counsel appointed to prepare the application. We suggest this because a defendant should not be left wondering if he or she will have counsel appointed. Removing the word "necessarily", we believe, accurately states the law as it exists today.

MCR 6.302(B)(6) The Court is concerned that this proposed amendment could conflict with MCL 770.3A(4) and implicate McDougall v Shanz, 461 Mich 15 (1999). It appears that substance of MCL 770.3A is addressing if appellate counsel shall be appointed. The criminal case is concluded when judgment is entered. The judgment in a criminal case is the sentence. The requirements to appoint counsel under MCL 770.3A(2)(a)(b)(c)(d) will not be known by the trial court until they occur, which is at the time of sentencing. It appears that the question of when this decision will be made by a trial court is a procedural question rather than a substantive one.

MCL 770.3A(4) requires a court to advise a defendant of contingent possibilities before a plea is accepted. Once a defendant is advised that by pleading guilty or Nolo Contendere he or she waives the right to appointed appellate counsel, the substantive mandate of the rule has been followed. Some contingencies, which might require appointment of counsel, cannot be known at the time the plea is accepted. Therefore, as a matter of procedure, a court should advise a defendant at sentencing if those contingencies which require appointment of counsel will occur. Once the contingency has in fact occurred, the court can then advise the defendant of the right to appointed appellate counsel. A court always has the option of allowing a defendant to withdraw a plea if the defendant relied on certain guideline scoring at the plea-taking proceeding or misunderstood the implication of the plea agreement because of the changed circumstance at sentencing.

MJA is of the opinion that it makes more sense to recite rights at the time they become relevant, rather than telling thousands of defendants something that will never be applicable to their situation. It seems that the issue of when a defendant is advised of a potential right is a matter of timing, and therefore procedural. If the amendment of the proposed rule is read in this manner, then the Court's concern with a potential conflict between the court rule and the statute may be resolved.

MCR 6.414(D) MJA supports this proposed amendment except for the following language: "The Court may, but need not, allow jurors to take their notes into deliberations. If the Court decides not to

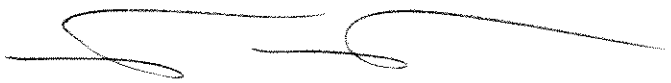
permit the jurors to take their notes into deliberations, the Court must so inform the jurors at the same time it permits the note-taking."

MJA believes that this particular language should be deleted from subparagraph D. If jurors are allowed to take notes, the judges could not think of a reason why they would not be able to take their notes into deliberations. The consensus was if the jurors are not going to be allowed to use their notes during deliberations, why have them take notes in the first place?

We thank the Court for considering our comments on this matter. If the Michigan Judges Association may provide any further information or assistance, we stand ready to assist the Court.

Sincerely,

MICHIGAN JUDGES ASSOCIATION



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